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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1513

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES
COURT OF CLAIMS

BRIEF OF BARBARA JENKINS, AMICUS CURIAE IN SUPPORT OF APPELLEE

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I. INTEREST OF THE AMICUS CURIAE

Barbara Jenkins, amicus curiae is the plaintiff in Jenkins v. United States Civil Service Commission, 460 F.Supp. 611 (D.D.C. 1978), appeal pending, No. 79-1199 (D.C. Cir.). Jenkins is a constitutional

challenge to the same provision of the Civil Service Retirement Act that is at issue here. Plaintiff Jenkins seeks -- and has been awarded by the district court -- full retroactive benefits for her son and for a nationwide class of children similarly situated.

Jenkins has an interest in Clark because she challenges the same statutory provision as the Clark plaintiffs and because resolution of her own lawsuit may be delayed while Clark is under consideration by this Court. The Civil Service Commission has moved in both the district court and the court of appeals in Jenkins for stays of further proceedings until Clark is resolved. These motions are pending.

While seeking to stay Jenkins pending resolution of Clark, the United States nevertheless observes that

the Clark children may be members of the Jenkins class, Jurisdictional Statement, p. 12, fn. 12.

II. THE FEDERAL QUESTION PRESENTED IS SO INSUBSTANTIAL THAT THE JUDGMENT BELOW SHOULD BE AFFIRMED OR, ALTERNATIVELY, THE APPEAL SHOULD BE DISMISSED.

A. COURTS HAVE UNANIMOUSLY AND REPEATEDLY DECLARED THE CHALLENGED PROVISION UNCONSTITUTIONAL.

The United States contends that the provision of the Civil Service Retirement Act which restricts survivor annuity benefits to those "illegitimate" children who "lived with" the Civil Service employee or Member in a "regular parent-child relationship" is constitutional. 5 U.S.C. §8341(a)(3)(A). This argument that the residency requirement is constitutional is plainly insubstantial.

As the United States concedes in its Jurisdictional Statement, p.7, fn. 5, "Several other lower federal courts have declared the lived-with requirement unconstitutional." In fact, the lower courts have been unanimous in their holdings that the residency requirement cannot withstand constitutional challenge.

At this point, no fewer than four courts, in addition to Clark and Jenkins, have found the challenged provision unconstitutional. Gentry v. United States, 546 F.2d 343 (Ct.Cl. 1976), reh. denied 551 F.2d 852 (1977), Myers v. Hampton, No. 8682 (S.D. Ohio, August 8, 1977, Myers II; September 18, 1973, Myers I); Tenny v. United States, 441 F.Supp. 224 (E.D. Mo. 1977); Proctor v. United States, 448 F.Supp. 418 (D.D.C.

1977) (three-judge district court).

Not a single judge in a single court considering this issue has ruled in the United States' favor.

So clear is the law on the constitutional issue that the Myers court ruled that it was not necessary to convene a threejudge district court to consider the constitutional question. The Myers court, in its September 18, 1973 decision, stated:

> In view of the clear thrust of recent federal decisions analyzed below, this court will accept the invitation extended to a single district judge in Bailey v. Patterson, 369 U.S. 31 (1962) and recently accepted by the chief judge of this district in Doe v. Brown, (#73-46, S.D.OH E.D., Kinneary) to declare a statute unconstitutional where any defense would be clearly frivolous.

> As Judge Friendly observed, "Congress could not have intended to require three judges to be assembled when decision could not possibly go in any way save one." Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1, cert. denied 389 U.S. 389 (1967), quoted in Charles Allen Wright, Law of Federal Courts 192 (1970).

The court found the Civil Service Commission's defense of the "live with" requirement "clearly frivolous."

Moreover, the United States has acquiesced in the repeated findings of unconstitutionality of the challenged provision. The earlier holdings of unconstitutionality cited above were not appealed to the Supreme Court by the United States. The Government filed a notice of appeal in Myers II in 1977, but then elected not to file a Jurisdictional Statement in January, 1978,

thereby abandoning its argument that the challenged provision is constitutional.

In Jenkins, the Government's concession on unconstitutionality was more explicit. On June 16, 1978, in response to a direct court order to state its position on constitutionality, the Government filed a Statement in Response to Court's Order of June 6, 1978, which, while ambiguously worded, resolved the constitutional issue in plaintiff's favor. While the Government wrote:

> Defendants do not concede the unconstitutionality of the aforementioned provision. They will not, however, assert the constitutionality of that provision in this litigation.

the parties and the Court thereafter treated the constitutional issue as

conceded. In its memorandum decision November 9, 1978, granting plaintiff summary judgment, the district court observed, "The defendants do not defend the constitutionality of the provision." 460 F.Supp. at 612.

The United States may not reasonably now argue -- after more than five years of litigation and six unanimous court decisions against it -- that the unconstitutionality of the residency requirement is in serious dispute. 1/

1/ The fact that the Government has proposed legislation to the present Congress to eliminate the "lived with" requirement (Jurisdictional Statement, p.10, fn. 8) undercuts its insistence upon the utility of and necessity for such a requirement and certainly in no way supports its argument that the requirement is constitutional.

B. THE LOWER COURTS FOLLOWED THE CLEAR DIRECTION OF THIS COURT IN FINDING THE CHALLENGED PROVISION UNCONSTITUTIONAL.

In uniformly ruling for the "illegitimate" children in their decisions, the lower courts carefully and properly analyzed the decisions of this Court concerning "illegitimacy." The Court repeatedly held that the "lived with" requirement is unconstitutional because it fails to provide certain "illegitimate" children with any opportunity to prove their membership in the group whom the Civil Service Retirement Act was intended to serve and, instead, automatically and conclusively disqualifies them from receiving benefits. These unanimous findings of unconstitutionality are in accord with this Court's holdings in Jimenez

v. Weinberger, 417 U.S. 628 (1974) and Mathews v. Lucas, 427 U.S. 495 (1976).

C. NO RECENT DECISIONS OF THIS COURT ALTER THE JUDICIAL CONSENSUS THAT THE "LIVE WITH" REQUIREMENT IS UNCONSTITUTIONAL.

The United States asserts that "further developments" in the law since Mathews v. Lucas now make it appropriate to appeal the Clark decision. The Government relies on Lalli v. Lalli, ____U.S. ____, 99 S.Ct. 518 (1978).

Lalli has no relevance to this appeal. Lalli involved a challenge to New York's inheritance law, which allows "illegitimate" children to inherit from their fathers by intestate succession only if the children can provide a particular form of proof of paternity (i.e.,

a judicial order of filiation issued during the lifetime of the father.)

In sustaining New York's intestacy statute, this Court recognized the substantial state interest in providing for the just and orderly disposition of property on death. This state interest, the Court held, distinguished Lalli from Jimenez and other cases disallowing classifications based on "illegitimacy" where no similar substantial state interest in property disposition on death is present. 99 S.Ct. at 525, fn. 6.

The Government implies in its Jurisdictional Statement that the "lived with" requirement serves a similar federal interest in securing finality in the survivor annuity

program. Jurisdictional Statement, p. 9. The Government points to the statutory provision authorizing eligible children to apply for benefits for up to 30 years after becoming eligible, 5 U.S.C. §8345 (h)(2), and argues that since beneficiaries receive retroactive payments to the day after the parent's death, 5 U.S.C. §§ 8341(e)(2) and 8345, "disruption" of the program occurs where "illegitimate" children apply for benefits many years after the parent's death.

Any such "disruption" caused in the operation of the survivor annuity program is caused by the statute, which authorizes applications to be made from all survivors for the full 30 year period. "Legitimate"

children may well apply for benefits many years after their parent's death. These children will be granted full retroactive benefits and any adjustments in payments to other beneficiaries will be made. The fact that the law contemplates an extended applications period by all survivors does not support denying benefits to one sub-group of survivors -- non-resident "illegitimate" children.

Moreover, even if Lalli is relevant to Clark, the Lalli decision lends substantial support to appellee's and amicus' position that the "lived with" requirement is unconstitutional. The Lalli court held that the single requirement imposed by the challenged law is simply an evidentiary requirement and that states are free to prescribe

any formal method of proof which "would assure the authenticity of the acknowledgement [of paternity]," 99 S.Ct. at 526, fn. 8. In so ruling, the Court distinguished Trimble v. Gordon, 430 U.S. 762 (1977), which overturned an Illinois intestacy statute that required, in addition to the father's acknowledgment of paternity, the legitimation of the child through the intermarriage of the parents. Lalli upheld a statute requiring only a prescribed demonstration of paternity; Trimble rejected a statute requiring demonstration of paternity plus intermarriage.

The Civil Service Retirement Act's "lived with" provision, like the Illinois law rejected in Trimble, imposes a requirement on

"illegitimate" children which is not related to a demonstration of parenthood. The "lived with" requirement is a burden to the applications process which bears no relationship to assuring the "authenticity of acknowledgment." Trimble and Lalli, properly viewed, both require a finding that the "lived with" requirement is unconstitutional.

The Government seeks to sustain the residency requirement in a two-step argument. First it contends that the Civil Service Retirement Act "is designed to assist the dependents of a deceased civil servant." Jurisdictional Statement, p.6. No authority for this proposition is cited. At least two courts have held that the Act is intended to provide benefits not only to dependents but

also to "surviving members of the immediate family of the annuitant, without regard to dependency." Gentry, 546 F.2d at 353; Jenkins, 460 F.Supp. at 613. The Government's statement of the purpose of the Act is too limited and overlooks the interests of a large number of the Act's intended beneficiaries.

Second, the Government contends that the residency requirement is a reasonable way of determining factual dependency. Lucas and Jimenez, however, instruct that a statute may lawfully discriminate against "illegitimate" children only if the children are given fair opportunity under the terms of the statute to demonstrate that they are in the

class for whom the statute was designed before they are conclusively denied benefits. The Act's failure to permit such proof of entitlement by those children not statutorily presumed entitled to benefits makes the Act defective.

Trimble and Lalli do not hold otherwise. Lalli specifically states that the Illinois statute was rejected in Trimble because "The reach of the statute was far in excess of its justifiable purpose." 99 S.Ct. at 527. The New York law, requiring only a specified form of proof of paternity, did not similarly exceed the justifiable purposes of the New York intestacy law and was thus sustained.

The "live with" requirement

of the Civil Service Retirement Act, assuming the Act is intended to serve only surviving dependents, far exceeds its justifiable purpose. Non-residency is not necessarily correlated with the lack of dependency. Many children may reside with one parent and yet be dependent upon the other parent for support. Any justifiable purpose in assuring that only dependent children receive survivor annuity benefits is not served by the residency requirement.

III. CONCLUSION

No substantial federal question is raised in this appeal. The six lower courts considering the constitutionality of the Civil Service Retirement Act's residency requirement

have properly analyzed the decisions of this Court concerning "illegitimacy" in unanimously declaring the law unconstitutional. The recent Lalli decision signals no change in the applicable law.

Amicus respectfully urges the Court to affirm the decision below, or, alternatively, to dismiss the appeal for want of a substantial federal question.

Respectfully submitted.

Edward C. King

May 1979